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IN THE

Supreme Court of the United States

October Term 1954.

No. [redacted] 70

DAVID SWIDLER, *Petitioner*,

vs.

UNITED STATES OF AMERICA.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

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No. .

DAVID SWIDLER, *Petitioner,*

v.

UNITED STATES OF AMERICA.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

The petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Third Circuit sustaining his conviction under Section 145(b) of the Internal Revenue Code.

OPINION BELOW.

The per curiam Opinion of the Court of Appeals (App. pp. 27-28) is not yet reported. There was no written opinion in support of the judgment of the District Court.

JURISDICTION.

The judgment of the Court of Appeals was entered on March 22, 1955. A petition for rehearing was denied on April 15, 1955. The jurisdiction of this Court is invoked under 28 U. S. C., Section 1254(1).

QUESTIONS PRESENTED.

Petitioner was convicted for income tax evasion under Section 145(b) of the Internal Revenue Code. The case was tried on a cash receipts and partial expenditures theory. The Government attempted to prove that the petitioner engaged in certain transactions in piece goods which resulted in net income to him which he did not report as such.

The questions presented are:

1. Whether a conviction can be sustained where the Government's evidence shows expenditures by the defendant for merchandise in excess of the gross income charged to him?

2. Whether a conviction can be sustained under this theory where the only evidence of the cash receipts con-

sists of testimony by a Government witness who stated that the petitioner turned the cash over to someone else in her presence?

3. Whether the trial judge's charge to the jury must contain a statement of the petitioner's theory of defense even if developed solely by cross-examination?

4. Whether the cumulative effect of rulings on evidence and comments and conduct by the trial judge was such as to prejudice the petitioner and deprive the petitioner of due process and his right to a fair trial by jury?

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED.

1. The Fifth Amendment provides, *inter alia*, that—No person * * * shall be compelled in any criminal case to be a witness against himself, nor to be deprived of life, liberty, or property, without due process of law; * * *

2. The Sixth Amendment provides, *inter alia*, that—In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, * * *

3. The Sixteenth Amendment provides, *inter alia*, that—The Congress shall have power to lay and collect taxes on incomes from whatever source derived * * *

4. Internal Revenue Code:

SEC. 145. PENALTIES.

* * * * * * * *

(b) Failure to Collect and Pay Over Tax, or Attempt

to Defeat or Evade Tax.—Any person * * * and any person who wilfully attempts in any manner to evade or defeat any tax imposed by this chapter or the payment thereof, shall, in addition to other penalties provided by law, be guilty of a felony and, upon conviction thereof, be fined not more than $10,000, or imprisoned for not more than five years, or both, together with the costs of prosecution.

* * * * * * * *

(26 U. S. C. 1946 ed., Sec. 145.)

STATEMENT.

Petitioner was indicted on March 6, 1952 in the United States District Court for the Eastern District of Pennsylvania on one count for willfully and knowingly attempting to defeat and evade income taxes, in violation of Section 145(b) of the Internal Revenue Code (R. 2a).

Petitioner was first tried and convicted on June 3, 1952. On December 4, 1952 the District Judge granted a new trial "in the interests of justice" (R. 1a), and at the same time denied a motion for judgment of acquittal. Petitioner appealed to the Court of Appeals from the denial of his motion for judgment for acquittal, which appeal was dismissed for want of jurisdiction: *United States v. Swidler*, 207 F. 2d 47. A petition for writ of certiorari was denied by this Court: 346 U. S. 915.

Petitioner again went to trial on September 28, 1954, before the same trial judge who presided at the first trial, but with different counsel. The theory of the prosecution was that the petitioner, who was engaged with other partners, in the business of manufacturing maternity clothes in Philadelphia on a small scale under the name "Mother Craft", engaged in certain transactions in piece goods during the year 1945 which did not appear on the partnership

business books and records and which resulted in net income to him which he did not report as such.

The Government introduced the testimony of Samuel M. Cohen, who testified that during the year 1945 he purchased rayon and crepe piece goods from two New York mills with his "priority." Cohen ordered these goods under the name of his company, Bridgeport Luggage Company; but paid the invoices with money received from the petitioner; and under the name "J. Levenson," forwarded the goods for shipment to various purchasers (R. 3a, 7a, 15a).

Cohen testified that he had been in the luggage business for about twenty-three years and that he had a government priority permit which enabled him to buy this merchandise (25a, 49a). Cohen stated that the cost price of these goods from the mills was about thirty cents a yard, and that he knew at the time that they had a market value of seventy-five cents to one dollar a yard (26a, 27a, 56a); and that the petitioner could not have bought the goods without his, Cohen's, priority (28a, 54a). Mr. Cohen stated emphatically, on at least four occasions during his testimony, that he, Cohen, "made no money" out of these transactions (41a, 46a, 47a, 54a, 55a).

On cross-examination, Cohen admitted that in 1942 he and his wife went into bankruptcy with only $25 and two small insurance policies in assets, but that in 1946, when he incorporated his business, he bought out his partner's share of the business, which had a net worth of some $50,000, increased the capital stock of the corporation by $20,000, and also loaned the corporation $32,000 (35a-37a). When asked where he secured the money to enable him to do these things, the witness replied that he had "borrowed it from his friends" (38a).

The following question was asked: "Would you tell the Court and jury how much money you are claiming from the Government at this time?" An objection to this question by the Government was sustained (R. 43a).

Samuel Einhorn testified that he was in the dress busi-

ness in Philadelphia and that he purchased fabrics from the defendant on several occasions in 1945 (86a). He was asked by the prosecutor, "By what name" did he know the defendant. Mr. Einhorn replied that he knew him as "David Swidler," and that he was a manufacturer of Mother Craft (86a). He stated that these goods were invoiced to him in the names of J. Levenson and Charles Schwartz, and that he paid for the goods by checks made out to Levenson and Schwartz (89a).

He stated that the defendant never pretended to be anybody else but Mr. Swidler. He further stated that he told the Government Agent, when he was asked who Charles Schwartz and J. Levenson were, "That is the people who I understand he made the purchases from for us" (88a). He further stated that the reason that he did not buy merchandise from Pacific Mills, although he had been in business for twenty years, was because he couldn't get it (90a).

Sol Lavin, a certified public accountant, testified that he prepared the defendant's personal income tax returns for 1945 and 1946, as well as the partnership returns for the Mother Craft partnership (107a); that he made out the partnership return for the fiscal period January 1, 1945 to May 15, 1945; that the defendant's distributive share of income for that period was $5,101.47, and that this amount was reported by the defendant as personal income for the calendar year 1945 (108a, 109a). Lavin further stated that the partnership was re-formed as of May 15, 1945; that the partnership return for the fiscal period May 16, 1945 to January 31, 1946 showed that the defendant's distributive share of income for that period was $9,012.47, and that this amount was reported by the defendant as personal income for the year 1946; that, in addition, the defendant had approximately $1800 in income from another partnership, or a total reported income of $10,891.30 (109a). Thereafter, the partnership books were kept on a fiscal year ending January 31st (117a).

Lavin testified that the Mother Craft books and records showed purchases by the partnership from Levenson and Schwartz, accounts payable to Levenson and Schwartz, and cancelled checks showing payments to Levenson and Schwartz (110a, 111a). Lavin testified that at the time of the reforming of the partnership on May 16, 1945 it was necessary for the defendant to assign $10,000 worth of accounts receivable in order to get a bank loan of $4,498.01 to operate the business (122a), and that the new partnership had an outstanding obligation of $12,908 at its inception to the old partners who had sold their interests (126a).

Sidney Goldblatt, a handwriting expert employed by the Treasury Department, testified that in his opinion the endorsements "Charles Schwartz" on the back of the checks were written in a disguised hand (141a). However, Mr. Goldblatt stated, both on direct examination and on cross-examination, that after a thorough analysis of the defendant's handwriting he could not say that these endorsements were written by the defendant (145a, 146a).

The Government attempting to prove that Levenson and Schwartz were non-existent people, and that the defendant cashed the checks made out to these names and kept the money, called Mrs. Charlotte Mintz, who operated a check cashing service in New York City, as a witness.

Mrs. Charlotte Mintz testified that in the year 1945 the defendant had been recommended to her by somebody she relied on a great deal (151a); that the person who recommended the defendant "said he would be responsible for anything I did in the matter" (160a); that the defendant would come to her place of business with one or two other men ("always there were two people, two or three people") (151a); that one of the other men was introduced to her as J. Levenson (153a); that they would present checks in large denominations to her endorsed with the names "Charles Schwartz" or "J. Levenson"; and that she would cash these checks (151a, 154a).

Mrs. Mintz testified that on some occasions the Levenson and Schwartz checks were presented to her by other people,

without the defendant being present at all (157a); and that, on those occasions when the defendant was present she wasn't sure *who* picked up the cash each time, but that when the defendant picked it up he would hand it to the other man present (158a).

Mrs. Mintz testified that on no occasion did the defendant represent himself to her as Levenson or Schwartz (157a); that during that same period she cashed personal checks for the defendant in the amounts of $29.60, $58.60 and $34.45; and that these checks were endorsed "David Swidler" (154a, 157a).

Daniel B. Shipley, a Special Agent of the Internal Revenue service, who investigated the defendant, testified that he went to his place of business and that he asked the defendant whether he knew Levenson and Schwartz. The Agent stated that the defendant told them he did; that he bought goods from Levenson but that he only dealt with Levenson, and that when he bought goods from Schwartz it was only through Levenson.

Mr. Shipley testified that he made the field investigation with regard to the defendant's income tax liability for the year 1945 (168a). Mr. Shipley testified that as part of his investigation he traced certain shipments of piece goods which had been sold on invoices from Levenson and Schwartz from their point of origin at the mills, through Bridgeport Luggage Company, to the ultimate purchasers (172a). Mr. Shipley testified that the total sales of such merchandise, as to which he could pinpoint the origin and cost price of the material and its ultimate destination and selling price, amounted to $107,927.08; and that the net profit on these transactions was $74,313.01 (169a).

On cross-examination, Mr. Shipley stated that in the course of examining the Mother Craft books and records he found that the defendant also purchased merchandise from Schwartz and Levenson for the partnership; that this merchandise was billed to the defendant at slightly above the mill price; and that the defendant paid for these goods by Mother Craft checks (174a, 176a). Mr. Shipley stated

further that during the course of the investigation the defendant told him that in 1945 he sold piece goods on behalf of Levenson and Schwartz in order to be able to get merchandise to operate his own business; that in payment for his services in this respect he was given merchandise for his own use at a reduced price (177a); and that he, the defendant, did not receive any money out of any of the checks made out to Levenson and Schwartz (176a, 181a, 182a).

Herman Bell, an Internal Revenue Agent, was called to the witness stand. He was asked by the prosecutor what the net income would be if a man makes certain sales of merchandise for $107,927.08 which cost $33,641.07. The court answered this question by stating what the amount would be, namely, $74,313.01. The Agent testified that there would be a tax liability in the amount of $46,698.14.

In response to a question by the court, which the court described as "just an assumption that has no bearing," "If the $107,927.08 were cut in half as far as income was concerned, which would amount to $53,963.54, and the goods cost the same, $33,614.07, which is a differential of $20,349.47, would that result in a tax liability?", the Agent replied that it would and stated that the tax liability would be $9,954.58 (192a).

During the course of the trial the judge stated that if he were called upon to make an observation at the conclusion of the case, "it won't be in fairness to the defendant" (R. 186a).

The judge interrupted petitioner's counsel's closing address to the jury and inferred that he had misstated a vital piece of evidence, then sent the jury out for a ten minute recess (R. 195a-199a).

In his charge to the jury the judge undertook to outline the evidence and theory presented by the Government to show the petitioner's guilt but did not charge the jury as to the nature of the petitioner's theory of the case. No exception was taken to the charge (R. 200a-206a).

At the conclusion of the trial the petitioner was found

guilty and was sentenced to ten months imprisonment and a fine of $5,000 (R. 1a). The judgment was affirmed by the Court of Appeals in a *per curiam* opinion (App. pp. 28-29).

REASONS FOR GRANTING WRIT.

1-A. In *Holland v. United States*, 348 U. S. 121; *Friedberg v. United States*, 348 U. S. 142; *Smith v. United States*, 348 U. S. 147 and *United States v. Calderon*, 348 U. S. 160, this Court undertook a thorough consideration of the application of the net worth method in the prosecution of violations of Section 145(b). The treatment afforded the petitioner in the instant case would seem to indicate that a review of methods of prosecution under other theories of tax liability is in order at this time.

This is not a "net worth" or "expenditures" case. The Government did not introduce any evidence to the effect that the petitioner's net worth increased in 1945 in an amount greater than he reported his income, nor was there any evidence introduced by the Government that the petitioner's expenditures exceeded his declared resources. The Government attempted to prove its case on the theory that in the year 1945 the petitioner received large sums of cash, representing profits from the sales of merchandise which he did not report as income. And yet, with the exception of one check, which was endorsed by the petitioner and his wife, and which, it was stipulated, was deposited in their joint bank account (129a, 160a) (Ex. G-48), there is not one scintilla of evidence that the petitioner received any cash out of the checks which were given in payment for the goods which were sold.

With regard to the petitioner, Mrs. Mintz, who operated the Mintz check cashing service, testified that he was present on some but not all of the occasions when the checks were cashed; that whenever he was present there was someone else with him (152a, 157a); and that one of these other

persons was introduced to her as a J. Levenson. Mrs. Mintz stated that her usual procedure in cashing checks was to count out the cash and put it down; that she wasn't sure who took it all the time; but that whenever the petitioner picked it up he would hand it to the other man that was present (158a). Mrs. Mintz also testified that during the same period that she was cashing Levenson and Schwartz checks in the amounts ranging from $1200 to $18,000, she was cashing personal checks for the petitioner endorsed with his own name in amounts ranging from $29.60 to $58.50 (156a, 157a). It is obvious that the petitioner cannot be charged with the receipt of income from the Levenson and Schwartz checks unless it can be shown that he received the proceeds of the checks. And yet, the cash proceeds of these checks were charged as income in computing the tax liability of the petitioner in this criminal prosecution.

It is clear and well settled that one who is engaged in the sale of merchandise and merely acts as a conduit or transmitting agent for the proceeds of the sale cannot be charged with the receipt of the income from the sales merely by virtue of having handled the money during the course of transactions; *Thomas v. Perkins*, 301 U. S. 665 (1937); *Mertens, Law of Federal Income Taxation*, Sec. 17.11, 17.12. The part played by petitioner in these transactions is quite clear, as evidenced by the testimony of the special agent. During the course of the investigation of his income tax liability, the petitioner repeatedly told the agent that he did not make any money out of any of the checks made out to Levenson and Schwartz; and that he was selling the merchandise on their behalf and not on his own. The evidence appears in the record in at least four different places (175a, 176a, 181a, 182a). The petitioner explained to the agent that the only thing that he received for his services was a lower price on merchandise to Mother Craft, which was then scarce and which he would not otherwise have been able to obtain (177a). This explanation by the petitioner was supported by the agent's own observation and

testimony. The special agent testified on cross-examination that when he examined the Mother Craft books and records he found several purchases at reduced prices from Schwartz and Levenson, as well as Mother Craft checks to cover these purchases (174a, 176a).

The constitutional concepts of due process and income are clearly not satisfied where the evidence produced by the prosecution establishes that the petitioner did not get the money which formed the basis for the prosecution.

B. Even accepting the Government's theory that the petitioner received and retained the proceeds of the checks, the Government's own evidence reveals that the expenditures exceeded receipts by $22,000.

Agent Shipley testified that to establish a tax liability he traced certain shipments from their point of origin and established the proceeds from the sale of these goods at $107,927.08 (169a, 172a). It was on the basis of this figure that Bell, the Examining Agent, computed the petitioner's tax liability, after first subtracting the sum of $33,614.07, which was given to him as the cost price of these goods (190a). However, the Government's own evidence showed expenditures for merchandise by the petitioner, not of $33,614.07, but of more than $130,000.00.[1] This would establish a net loss from sales of more than $22,000.00, rather than net income.

It is almost too clear to deserve comment that gross income and not gross receipts must be used as the foundation

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[1] Government Exhibits G-15 and G-18 (212a, 213a), which are Accounts Receivable cards of Beaunit Mills and Pacific Mills pertaining to Bridgeport Luggage, show that Samuel Cohen paid these two firms the sums of $96,468.42 and $43,631.47 (56a, 58a), and it was the government's theory that except for three or four shipments which Cohen used himself, Swidler gave Cohen the money to pay for all of these purchases. Taking 90% of the Beaunit figure to allow for the purchases Cohen made on his own behalf, it can be seen that Swidler paid $86,821.57 for goods from Beaunit and $43,631.47 for goods from Pacific, or a total of $130,453.04 (4a).

for establishing income tax liability; *Clark v. United States*, 211 F. 2d 100, 103 (8th Cir. 1944).[2] In order to calculate income, total expenditures must be first subtracted from the proceeds of sale; *Burnet v. Logan*, 283 U. S. 404 (1931). See also *Hofferbert v. Anderson Oldsmobile*, 197 F. 2d 504 (4th Cir. 1951) and cases cited therein; *Mertens, Law of Federal Income Taxation*, Sec. 5.07.

Nor is the Government entitled to establish gross income by deducting only those expenditures which it picks and chooses out of a welter of transactions. The Government having introduced evidence of gross receipts from the sale of goods, in this case of $107,927.08, cannot determine that it will deduct from that figure only the amount which it calculates as the cost price of those particular goods. If the evidence shows expenditures by the petitioner of $130,000, he is entitled to a deduction of that amount from the gross receipts figure. The law is clear that business transactions cannot be "atomized" for tax purposes; *Helvering v. New Haven & S. L. R. Co.*, 121 F. 2d 985 (2nd Cir. 1945). They must be viewed as a whole; tax consequences cannot be determined by treating component steps of a transaction separately; *Burton v. Commissioner*, 190 F. 2d 115 (5th Cir. 1951); *Forrest Hotel Corp. v. Fly*, 112 F. Supp. 782 (D. Miss. 1953).

All circumstances here indicate that the expenditures exceeded the sales and it was, therefore, incumbent on the Government to adduce further positive evidence as to what happened to the goods that were not sold, or, if sold, who received the cash proceeds of those sales. It is well settled that whether or not a defendant submits evidence in his

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[2] There the Government's computation included the cost of all the merchandise the petitioner bought for sale. A different problem is presented where the petitioner claims that the burden is on the Government to establish that he did not have any other deductions. **United States v. Stayback**, 212 F. 2d 313, 317 (C.A. 3d), certiorari denied, 348 U. S. 911. In the instant case the Government by its own testimony established that the actual expenditures exceed the actual receipts.

own behalf, the burden is still upon the Government to prove every element of the offense beyond a reasonable doubt. The Government attempted to smuggle in a fantastic theory of only selecting partial expenditures to create an income liability. This is a fiscal impossibility. It is submitted that under the Constitution, taxes can only be levied on net income and not on partial gross receipts.

C. The charge of the trial court not only violates the principle, enunciated in the *Holland* case, that the charge in a tax evasion case should be especially clear, and should include, in addition to the formal instructions, a summary of the nature of the method relied upon by the Government, and the inferences available to the accused; but is in direct conflict with the decision of the Court of Appeals for the Seventh Circuit in *United States v. Phillips*, 217 F. 2d 435.

The only portion of the Judge's Charge which refers to the evidence presented in this case was as follows (204a):

> "What is the contention of the Government in this case? The contention of the Government in this case is that they have proved to you a pattern of conduct on the part of this defendant in the obtaining and selling of piece goods or cotton merchandise; that over a period of time and in the year 1945 he engaged in transactions running into a few hundred thousand dollars; out of that they have taken certain individual items and from those individual items that have been testified to here they have taken certain ones as to which they say: 'We have traced these goods from the mills to the ultimate purchaser. They were sold through the defendant under the names of Levenson and Schwartz and therefore we charge he received the profits, the total sum less the cost of the goods, and, therefore, he received taxable income which he did not report, in the sum of $74,000, and he owes a tax of some $46,000 on it over and above that which he reported.' "

A trial court need not charge on the evidence, but if it does it must present both sides and not charge only on "the contention of the Government." The jury might well have concluded under the circumstances of this case that the trial judge and the Government were synonomous. It must not be one-sided. The petitioner had contended throughout the entire trial that he had sold goods not for himself but on behalf of others; that his reason for doing this was to obtain merchandise for his own small business; that the profits from the transactions were not kept by him, but were turned over to other people. This was the petitioner's "contention." Merely affirming a point for charge is not stating what the petitioner's "contention" was. Especially is this most prejudicial where in a case based on circumstantial evidence, the circumstances that tend to show the petitioner's innocence are not mentioned by the Court, only the circumstances that tend to show his guilt.

In the Government's brief, on page 24 in the court below, the Government contended that testimony elicited on cross-examination is not sufficient to create a defense. The decision of the Court of Appeals *sub silentio* places its stamp of judicial approval upon the Government's argument.

Throughout the entire course of the trial the petitioner consistently presented the defense that he received no money from the Schwartz and Levenson transactions. That defense was presented by means of extensive cross-examination of most of the Government witnesses, and the petitioner was entitled to a charge on his defense. This very point was passed upon in *United States v. Phillips*, 217 F. 2d 435, 440 (7th Cir. 1955), in which the Court stated that a defendant is entitled to a charge with regard to his theory of the case on the basis of his cross-examination of Government witnesses:

> "Thus it is inherent in this statement, given as the reason for denying the instruction, that the defendant was not entitled to an instruction based upon favorable testimony given by government's witnesses, but that as

a prerequisite to his right to such an instruction, there must be testimony coming from his side of the case. We think this was clearly an erroneous idea, the effect of which was to shift the burden of proof."

The Court further stated, at page 441:

"We think the government's contention, apparently embraced by the trial court, that a defendant is not entitled to an instruction embodying a theory merely because it is predicated upon proof adduced by the government, is not the law. A case closely in point is *Tatum vs. United States*, 88 U. S. App. D. C. 386, 190 F. 2d 612, wherein evidence relative to defendant's sanity was offered by the government. A judgment of conviction was reversed because that issue, under proper instructions, was not submitted to the jury, even though the trial court was not requested to do so. The court stated, 190 F. 2d at page 615: 'But as soon as "some evidence of mental disorder is introduced, the prevailing rule in most jurisdictions is that sanity, like any other fact, must be proved as part of the prosecution's case beyond a reasonable doubt" '."

The court on the same page quoted from *Davis v. United States*, 160 U. S. 469, 487, 16 S. Ct. 353, 40 L. Ed. 499:

" 'Strictly speaking, the burden of proof * * * is on the prosecution from the beginning to the end of the trial and applies to every element necessary to constitute the crime. * * * the vital question from the time a plea of not guilty is entered until the return of the verdict, is whether upon all the evidence, by whatever side adduced, guilt is established beyond a reasonable doubt'."

Nor is the failure of petitioner to specifically request such a charge fatal, for the error is one "affecting substantial

rights" and is cognizable by this Court of its own motion under Federal Rules of Criminal Procedure, Rule 52(b).

Your petitioner submits that this charge is basically erroneous; that it violates the principles laid down by this Court in the *Holland* case; and specifically fails to recognize that a defendant may establish his defense based upon favorable testimony given by Government's witnesses on cross-examination. This is a question plainly in the public interest since it is likely to be presented in current and subsequent criminal proceedings.

2. According to common experience few shafts strike deeper into jurors' minds during trial than words spoken by the presiding judge. It is also perfectly clear that the practical repercussions of his utterances cannot always be clearly traced to and through jury verdicts. But this case does not involve gossamer possibilities of prejudice to a defendant; it is submitted the cumulative effect of the trial Court's comments, rulings deprived petitioner of a fair trial. *Some* of the prejudicial errors committed by the trial Court are:

A. The trial court gravely prejudiced the defendant by questioning the handwriting expert about the defendant's wife's signature.

Serious prejudicial error was committed by the trial court when he asked the Government's handwriting expert whether there was any similarity between Lilyan Swidler's signature and the endorsements of the name of Charles Schwartz. These questions came at a critical point in the trial. The handwriting expert, Goldblatt, had testified that his study of the various checks brought him to the conclusion that the name "Charles Schwartz" had been written in a disguised hand (141a); but even after four months of analysis he was not able to say that these endorsements had

been written by the defendant, David Swidler (148a). Whereupon, the following colloquy took place:

"BY THE COURT:

"Q. Look at G-48 and see if you see anything on there that is similar to anything in Group 2 of your chart.

"A. First, Your Honor, I would like to say that this is what we might call an off-the-cuff statement, and I haven't ——

"Q. I am just asking you if there is anything on there that might be—let us not say that it is—that might be referable back to Group 2.

"A. There is a possibility that the S appearing in the signature Lilyan Swidler has a similarity to the capital S appearing on the endorsement.

"Q. You are not making any statement, however, as an expert? You are just saying that at a glance, but you are not saying anything at all about it? You are not connecting it?

"A. No, I am not. I just say that there is a possibility of similarity in the capital S in the name Swidler appearing after Lilyan and the capital S's appearing on the endorsements of the questioned checks.

"Q. That would require intensive study for a long period of time?

"A. It would, sir.

"Q. Before you could make any ——

"A. That is correct.

"MR. LEES: I have no objection, sir, if Mr. Kossman (412) wants to enter into a stipulation that were Mr. Kossman's expert here he would say the same thing.

"MR. KOSSMAN: Except for any off-the-cuff statement, which is not part of it, really.

"THE COURT: No."

It is submitted that such "might be" questions by the Court prevented the defendant from cross-examining the

expert on his "non-expert" opinion. The fundamental rule applicable to receiving opinion evidence was here violated, and under the circumstances of this case was most prejudicial to the petitioner. See *Wigmore on Evidence,* Sec. 2011.

In suggesting to the handwriting expert to examine whether petitioner's wife might have been the one who signed the endorsements on the Schwartz checks, the judge injected into this case a prejudicial element incapable under the circumstances of being rebutted. When the expert answered that this was a "possibility" the jury was left with an impression that seriously damaged the petitioner since a jury may well believe that an expert can determine *without analysis and study* what is not so readily apparent to the Jury. This is even more harmful to petitioner when such impression is created by means of questions posed by the trial judge.

B. The Court erred by asking the Government's tax expert what the defendant's tax liability would be if the Government's figure were cut in half.

After Bell, the Examining Agent, had testified as to what the defendant's tax liability would be, based upon a figure of $107,927.08 received from sales of the goods traced by Agent Shipley, the following questions were asked by the court (192a):

> "Q. May I ask you one question. If the $107,927.08 were cut in half, as far as income was concerned, which would amount to $53,963.54, and the goods cost the same, $33,614.07, which is a differential of $20,349.47, *would that result in a tax liability?*
>
> "A. Oh, yes, sir.
>
> "Q. *This is just an assumption that has no bearing. I am just making an assumption.*
>
> "A. Yes, sir, it would.
>
> "Q. What would the tax liability be on that? In

other words, instead of the $74,313.01 figure you would have a figure to start with in place of that of $20,349.47?

"A. I get $9,954.48.

"Q. $9,954.48?

"A. Yes, sir.

"Q. Taking the assumption that the price received was only half of $107,000?

"A. That is right, sir.

"Q. It would still leave a tax liability of $9,954.58?

"A. That is right, sir.

"THE COURT: All right. Proceed, Mr. Lees." (Emphasis supplied.)

The judge should not have asked the revenue agent what petitioner's tax liability would be if he had received only half the income with which he was charged. This question obviously suggested to the jury that the judge was of the impression that the petitioner shared the profits from the Levenson and Schwartz transactions with some other person. The prosecution had not relied upon this theory of some other person in the proof of its case, and the prejudicial effect of this question is certainly not removed by the Court stating that this was "an assumption that has no bearing". It is submitted that the judge put aside the cloak of impartiality required of him and assumed the role of prosecutor in suggesting this theory to the jury. The Court asking a revenue agent whether there would be any tax liability if the gross income was cut in half, of necessity, must usually receive an affirmative answer which under the circumstances of this case and other similar cases is most prejudicial. Prosecution should be left to the officials who are charged with that duty and not to the trial judge.

C. The Court erred in withdrawing from the jury the vital issue of the credibility of witnesses for the Government by his remarks.

Interrupting the cross-examination by counsel for the petitioner, the Trial Court made the following remark:

> "I made that observation in fairness to defendant. If you want another observation at the conclusion of this case about what has happened in this trial I will also make it, but it won't be in fairness to the defendant" (186a).

It is submitted that the effect of this remark was to withdraw the issue of credibility of certain specific Government witnesses from the jury by stamping what they had said at this trial as true, although at the first trial these witnesses had testified differently. A trial court cannot withdraw the issue of credibility of witnesses from the jury. In stating that any remark he might make at the close of the trial "won't be in fairness to the defendant", the judge injected a mental toxin in the minds of the jury that under the circumstances of this case sealed his doom. According to the ordinary, average, human way of thinking, which is what the jury represents, such a comment would clearly indicate to the jury that the judge in this trial even before it was over was unfair to the defendant only because he believed him to be guilty. It is submitted that this was a most prejudicial statement, especially coming from the judge, who the jury knew had presided at the first trial and had granted a new trial.

A trial court has no right to make any "observation" that is not "in fairness to the defendant". This is most fundamental, and it's clearly a violation of the constitutional right of the defendant to have a fair trial by jury.

D. The Court erred in unduly restricting the cross-examination of the Government witness.

Samuel Cohen was an important witness. He testified at great length on behalf of the Government. On cross-examination he was asked the following question: "Would you tell the court and jury how much money you are claiming from the Government at this time?" An objection to this question by the Government was sustained (43a).

It is submitted that it is most elementary that the size of a witness' claim might well affect his motive in testifying for the Government under the circumstances of this case. The witness had a claim against the Government. If he had received, directly or indirectly, the income charged to the petitioner his claim against the Government would have been in jeopardy. The motive of a witness is a proper subject for cross-examination. *Alford v. United States*, 282 U. S. 687; *McFarland v. United States*, 174 F. 2d 538; *Wigmore on Evidence* (3rd Ed. 1940) Sec. 967.

E. The Court prejudiced the defendant by interrupting the defendant's counsel's address to the jury and in sending the jury out in the middle of the address.

In spite of the fact that Government witness, Cohen, stated repeatedly during the course of his testimony (41a, 46a, 47a, 54a, 55a) that he made no money out of his dealings with the defendant in 1945, and Internal Revenue Agent, Shipley, stated that Cohen had so told him (187a), when the defendant's counsel referred to this fact in his summation to the jury he was interrupted by the Court and asked to find a statement by Cohen to that effect in the record (195a, 197a).

The Court justified the interruption on the ground that

he wanted to be sure of Cohen's testimony, since he might want to charge the jury on Cohen's credibility (198a).

During the course of the ensuing colloquy, the Court stated (196a, 197a):

> "THE COURT: All right, come up with it later. If it is there, you can come up with it later. I just didn't remember that statement, that he had admitted that on the stand, that he had not included the profits made from the sale of this merchandise on the books of the company. I don't remember him saying that.
>
> "MR. KOSSMAN: Yes, I had that copied from here directly, Your Honor.
>
> "THE COURT: I don't remember him saying it. He may have and I would like to find it if I could, because it may make a slight difference in my charge on the question of credibility. That is the only reason I interrupted you. Having been interrupted, don't you think we ought to take a five-minute recess because we have been stopped for several minutes now? We will take a five-minute recess, members of the jury. If you find it let me know.
>
> "I don't mean to interrupt the speeches, but since we are stopped, make it ten minutes, members of the jury."

And yet, during Cohen's testimony the Court had let it be clearly known that he understood Cohen's testimony on this point and was only concerned whether counsel for the defendant understood it (54a):

> "Q. Do I consider your answer you made no money?
>
> "A. That is right.
>
> "THE COURT: *He said emphatically, 'There was no money made by me.' That was the end of the answer. I am not sure you heard it.*" (Emphasis supplied.)

It is submitted that this conduct on the part of the Court constitutes the gravest prejudicial error. If counsel for the defendant had made a misstatement of the facts, since the District Attorney did not object and the Court was only concerned with the charge that he was going to make (196a), there was no necessity for the interruption. Any misstatement of the facts could have been remedied by the Court after the address. But there was no misstatement of the facts. It is submitted, that the Court created the impression with the jury that defendant's counsel was misstating the evidence, and prevented a fair and dispassionate consideration of the evidence by the jury. Again it is earnestly urged that this action by the Court completely and irrevocably sealed the doom of the defendant.

In *Quercio v. United States*, 289 U. S. 466, 470 (1933), this Court stated:

> "This privilege of the judge to comment on the facts has its inherent limitations. His discretion is not arbitrary and uncontrolled, but judicial, to be exercised in conformity with standards governing the judicial office. In commenting upon testimony he may not assume the role of a witness. He may analyze and dissect the evidence, but he may not either distort it or add to it. His privilege of comment in order to give appropriate assistance to the jury is too important to be left without safeguards against abuses. The influence of the trial judge on the jury 'is necessarily and properly of great weight' and 'his lightest word or intimation is received with deference, and may prove controlling.' This Court has accordingly emphasized the duty of the trial judge to use great care that an expression of opinion upon the evidence 'should be so given as not to mislead, and especially that it should not be onesided'; that 'deductions and theories not warranted by the evidence should be studiously avoided'."

The principles of the above decision, we submit, were not followed by the trial court in this case. The comments by the trial judge, the injection of foreign prejudicial issues into the case, the prejudicial interruption of counsel's closing argument to the jury, the limitations on cross-examination, the failure to charge on petitioner's theory of the case, make this case one in which the trial judge so far departed from the accepted course of judicial impartiality with the sanction of the court below, as to call for an exercise of this Court's power of supervision.

Petitions for writs of certiorari on the basis of the denial of a fair trial because of the conduct of the trial court have been appearing with increasing regularity. Accordingly, it would appear proper at this time for this Court to *redefine* the standards of judicial conduct to be followed by trial judges in criminal cases.

CONCLUSION.

For the foregoing reasons this petition for a writ of certiorari should be granted.

Respectfully submitted,

JACOB KOSSMAN,
1325 Spruce Street,
Philadelphia 7, Pa.,
Counsel for Petitioner.

Appendix

OPINION.

UNITED STATES COURT OF APPEALS.
FOR THE THIRD CIRCUIT.

No. 11,475.

UNITED STATES OF AMERICA,
vs.
DAVID SWIDLER,
Appellant.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA.

Argued March 11, 1955.
Before McLAUGHLIN, STALEY and HASTIE,
Circuit Judges.

OPINION OF THE COURT.

(Filed March 22, 1955.)

PER CURIAM.

From our own examination of this income tax evasion case we are satisfied that (1) there is substantial evidence

in the trial record to justify appellant's conviction and (2) the trial court's comments, rulings and charge did not deprive appellant of a fair trial.

The judgment of the district court will be affirmed.

A true Copy:
Teste:

Clerk of the United States Court of Appeals for the Third Circuit.

JUDGMENT.

UNITED STATES COURT OF APPEALS.
FOR THE THIRD CIRCUIT.

No. 11,475.

UNITED STATES OF AMERICA,
vs.
DAVID SWIDLER,
Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA.

Present: McLAUGHLIN, STALEY and HASTIE,
Circuit Judges.

JUDGMENT.

This cause came on to be heard on the record from the United States District Court for the Eastern District of Pennsylvania and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court in this case be, and the same is hereby affirmed.

Attest:

IDA O. CRESKOFF,
Clerk.

March 22, 1955.

UNITED STATES COURT OF APPEALS.

FOR THE THIRD CIRCUIT.

No. 11,475.

UNITED STATES OF AMERICA,

VS.

DAVID SWIDLER,

Appellant.

SUR PETITION FOR REHEARING.

Present: McLAUGHLIN, STALEY and HASTIE,
Circuit Judges.

After due consideration the petition for rehearing in the above-entitled case is hereby denied.

By the Court,
McLAUGHLIN,
Circuit Judge.

Dated: April 15, 1955.
(Received and Filed
April 15, 1955.
Ida O. Creskoff, Clerk.)

No. [redacted] 70

FILED
MAY 12 1955
HAROLD B. WILLEY, C

In the United States Court of Appeals

For the Third Circuit

No. 11,475

UNITED STATES OF AMERICA,
Appellee

v.

DAVID SWIDLER,
Appellant

Appeal from the Judgment and Sentence of the District Court of the United States for the Eastern District of Pennsylvania (Criminal Action No. 16639).

APPELLEE'S APPENDIX

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APPENDIX

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

Criminal No. 16639

United States
vs.
David Swidler

I.

EXCERPTS FROM TRANSCRIPT OF TESTIMONY

[2] SAMUEL M. COHEN, having been duly sworn, was examined and testified as follows:

[34] *Cross Examination*

* * * * * * * * *

[75] BY MR. KOSSMAN:

Q. And this is the last question I am going to ask you, Mr. Cohen:

Back in 1945 you purchased merchandise from mills, which you say Mr. Swidler gave you the money. Sometimes he paid in advance, prepaid. You knew, you now testify, that you were doing something illegal

using that priority that the Government had given to you to use for your goods, for your purpose. You allowed shipments to come out, and you say you didn't make and you weren't the man who made all the profit, aside from the small commissions that Mr. Swidler might have made. Now, what is your answer to that?

MR. LEES: I object to the question.

THE COURT: Sustained. This is the first time I ever heard of Mr. Swidler making any commission on anything, so that question is completely improper the way it is framed.

[76] MR. KOSSMAN: I will reword it. Let us put it this way.

THE COURT: He has testified to every part of the question except that you now have thrown in that Swidler made commissions on these transactions. That is the new part of the question, and that isn't even in the case yet.

• • • • • • • • • •

[138] MILTON SIMON, having been duly sworn, was examined and testified as follows:

Direct Examination

BY MR. LEES:

Q. Where do you live, Mr. Simon?

A. 11 Riverside Drive, New York City.

Q. And your business?

A. I am with Gimbel Brothers Central Buying Office.

Q. In 1945 what was your business?

A. I was with Kaufmann's for a short while in Pittsburgh, and the New York Office.

Q. What kind of work were you doing?

A. Same work as I do today, assist the buyers when they come to town and take them around to market, and market reports.

Q. In 1945 did you know David Swidler, the defendant in this case?

A. I met Mr. Swidler.

Q. Where did you meet him?

[139] A. The first time I met him I met him down at a cafe in White Street.

Q. Do you remember who introduced you?

A. I don't think I do. I was at lunch. I know it was around lunch time.

Q. Under what name was he introduced to you?

A. I believe it was Mr. Levenson.

Q. Just Levenson? Was there a first name?

A. Levenson, that is all.

Q. Did you have a conversation with him?

A. Just to the extent of some merchandise, that is all.

Q. What do you mean, to the extent of some merchandise?

A. Our New York Office at that particular time, merchandise was scarce in the market, and one of our ready-to-wear buyers—I just don't remember her name—she was always after us people to look around and see if we couldn't get merchandise so that they could manufacture or buy goods for their manufacture. We wouldn't buy it but recommended someone who would have goods, so the manufacturer could make garments, either linings or piece goods, or whatever it might be, and if we saw anything

like that we were supposed to come back to the office and report it.

Q. I take it that the goods that the manufacturers made were to be used by you?

[140] A. Yes, some of the goods, that is right, to help make our orders.

Q. All right, now, having stated that fact, what did you say that Mr. Swidler talked about to you?

A. Why, there was some linings, I had been instructed to look for some linings, and Mr. Swidler happened to have some merchandise there that we thought would fit into the picture of linings, so I recommended him to a manufacturer. I came back and told the ready-to-wear girl first, and she asked me to please have Mr. Swidler or Mr. Levenson get in touch with this manufacturer.

Q. Where did you take Mr. Swidler?

A. To a manufacturer over, I believe, on 7th Avenue. I am not sure of the address.

Q. What was the name of the firm?

A. Diamond, Mrs. Diamond. I don't remember the name of the firm. If that was the name of the firm, I wouldn't be sure.

Q. Do you know what she manufactured?

A. I believe it was coats. She was looking for linings.

Q. You took Mr. Swidler there; is that right?

A. That is right.

Q. When was that, do you remember?

A. Just exactly, I couldn't say, but it was very shortly after I met him, because he had the merchandise and I had reported to [141] the office. They asked me to contact the man again, and I did, and I made an appointment to meet him up there and introduced him to Mrs. Diamond.

Q. Did you introduce him?

A. Yes.

Q. Were you present in their conversation?

A. No.

Q. And when you introduced him to Peggy Diamond—what did you say her name was?

A. Diamond.

Q. When you introduced him to Mrs. Diamond, how did you introduce him?

A. This is a man that got some linings—Mr. Levenson—and that was it.

Q. What happened then?

A. Mrs. Diamond bought some goods, as I understand, from him.

Q. Well, now, you weren't present when they had the conversation?

A. No, I was not.

Q. Is that all you know about the transaction with Mrs. Diamond?

A. No. Something went wrong with the goods, and she came to our office or she contacted someone, I guess the buyer in our [142] office, to—

Q. What did you do? Don't tell us about a conversation.

A. No. I am leading up to exactly what happened, if you will allow me.

Q. Just tell us what happened.

A. The lady that bought the goods contacted our office, would I please contact the man that sold her the goods, she wants to talk to him. Something went wrong with the linings. Whatever it was, I don't know.

Q. Did you get in touch with him?

A. I contacted the man. I got the number and I had him go up to see Mrs. Diamond.

Q. You told him to go up to see Mrs. Diamond?

A. Yes.

Q. Did you take him up or just give him the message?

A. No, I told him.

Q. Do you know whether he went?

A. I believe he did.

Q. Because somebody told you?

A. I believe he did, that is right.

Q. And that is all you know about Mrs. Diamond; is that right?

A. That is all.

Q. Do you know about any other transactions that Mr. Swidler [143] had in 1945?

A. Kaufmann's Department Store, the buyer bought some goods from him and the goods were returned.

Q. You are going too fast. You say that Kaufmann's bought some?

A. Yes, the buyer.

Q. Were you present when that sale was made?

A. No, I wasn't present when the sale was made. When it was talked about. Some goods, merchandise was shown to the buyer.

Q. You had a conversation with Mr. Swidler about some goods?

A. That is right.

Q. And somebody else?

A. Mr. Swidler and the buyer had conversations.

Q. Who is the buyer?

A. Harry Meyer, that was his name.

Q. Were you present?

A. When they had conversation about the goods, yes.

Q. What did they say?

A. Well, they just showed him the goods.

Q. Who showed the goods?

A. Mr. Levenson showed the goods to the buyer, and the buyer looked at the goods and made up his mind whether he was going to buy it or not, and later on he bought the goods and they were [144] shipped into Kaufmann's.

Q. Do you know what goods were purchased by Kaufmann's at that time?

A. I believe there were some—

Q. If you don't know, say so.

A. To the best of my knowledge—

THE COURT: When a person says he believes, a non-professional witness sometimes uses the language of the street. When he says, "I believe," that is his recollection. Is that what you mean?

THE WITNESS: To the best of my knowledge, yes, sir.

THE COURT: All right, go ahead.

THE WITNESS: To the best of my knowledge, there were some plain goods and some prints. Now, what they were, I couldn't say. I don't remember.

BY MR. LEES:

Q. What else happened in connection with that transaction, if anything?

A. Later on the goods came to the store, and they were returned. Harry Meyer, I believe he quit at that particular time or just a little bit after that, and the goods

were returned to Levenson, and Mr. Levenson brought the money, the cash, in for the goods that Mr. Kaufmann had paid him for, and it was returned by Mr. [145] Kaufmann.

Q. Were you present at that transaction?

A. I saw that transaction take place.

Q. Where did that take place?

A. In the New York Office on 5th Avenue and 41st Street, upstairs.

Q. How much money did you say Mr. Levenson or Mr. Swidler returned? How much was it?

A. I wouldn't know right now. I wouldn't remember that. I am assuming it was the amount of the invoice, as long as they returned the goods. I am assuming.

Q. What did he say at the time?

A. I don't think there was too much conversation about it, as far as I can remember. I just watched the transaction, the money going back, and that was all. I was very busy in my office.

Q. You were present there because you were working at the time?

A. That is right, that is right.

Q. Did he hand him a check or did he hand him a lot of money?

A. I believe it was cash.

Q. Did you see what type of cash? Was it gold or silver or paper, or what?

A. I believe it was bills.

[146] Q. Have you had anything to do with Mr. Swidler since that time?

A. No, I have not.

Q. Did you know him by any other name but J. Levenson at that time?

A. Not at that time, no.

Q. Was he ever introduced to you as anything else?

A. No.

BY THE COURT:

Q. You did learn his name was Swidler, however, later, didn't you?

A. I heard it later on, yes, sir.

* * * * * * * * *

[166] WILLIAM J. STEIN, having been duly sworn, was examined and testified as follows:

Direct Examination

BY MR. LEES:

* * * * * * * * *

Q. Did you know the defendant, David Swidler, in 1945?

A. Yes, I did.

Q. What name did you know him as?

A. David Swidler.

Q. How did you know him at that time?

[167] A. He was a customer where I was employed.

Q. A customer of Milton C. Blum?

A. A customer of Milton C. Blum.

Q. Did you have any business transactions with him?

A. The house had some transactions with Mr. Swidler.

Q. Did you have any transactions?

A. Yes, I did.

Q. Will you tell His Honor and the members of the jury what that transaction was?

A. Well, there were numerous transactions whereby goods were obtained for Mr. Swidler.

Q. Who obtained the goods?

A. I obtained the goods for Mr. Swidler.

Q. How did you start? Tell me how or why you procured goods for him?

A. Well, Mr. Swidler came into the office, and he asked if there were goods obtainable outside of our office or outside of where I was employed.

Q. He asked you this?

A. Yes, and I said I thought I could obtain some goods for him.

Q. What kind of goods did he say he wanted?

A. Cotton goods.

Q. Did he say for what purpose?

[168] A. No. Frankly, I don't recall, and I obtained some goods for Mr. Swidler.

Q. Where did you obtain those goods?

A. I obtained the goods from Regal Equipment.

Q. And that is where?

A. They were located on Broadway in New York City.

Q. Now, when you say these goods came from Regal Equipment Company, what do you mean? Did they take Mr. Swidler there? Did you call him up? Did you write a letter? How did the transaction develop?

A. When goods were obtainable I talked with Mr. Stein of that company, and when goods were obtainable—

Q. You say Mr. Stein?

A. Mr. Stein is or was the head of Regal Equipment.

Q. You are Mr. Stein, too?

A. That is correct.

Q. What is this man's name?

A. His name is Mr. Stein.

Q. What is his first name?

A. Murray Stein.

Q. Is he here in court today?

A. Yes, he is.

Q. Are you related to him?

[169] A. No.

Q. All right, continue, sir.

A. When goods were obtainable, when Mr. Swidler came in I mentioned it to him, or if he asked me if there were any goods, I determined what was available and mentioned it to him. He either called me or I called him when he was in town.

Q. And you would say what?

A. I would say that there were X amount of goods available, and he would say, "Well, fine," and a good would be consummated whereby the goods would be shipped according to whatever instructions I was given or the company was given.

Q. Who gave you the instructions?

A. David Swidler.

Q. Do you know whether or not David Swidler had dealings directly with Regal Equipment?

A. I don't think he did.

Q. They were through you?

A. That is correct.

Q. How would he give you shipping instructions? Over the telephone or would he see you?

A. He would either see me or call me.

Q. Would they be written down?

A. Not necessarily.

[170] Q. And you would do what?

A. I would inform the shipping department of Regal Equipment to ship the goods, or a call possibly may have come in and told them to ship the goods.

* * * * * * * * *

[171] Q. Did Mr. Swidler ever give you any money for this?

A. Yes, he did.

[172] Q. How much?

A. $2500.

Q. When did he pay you that?

A. At various times.

Q. And how did he pay it to you?

A. In cash.

Q. Did he ever give you a check?

A. No, sir.

Q. Did you ever have anything to do with the billing from Regal to Swidler?

A. No, sir.

Q. Did you ever have anything to do with the billing from Swidler to whoever got the goods?

A. No, sir.

Q. Did you ever have anything to do with the payment from Swidler to Regal for the goods?

A. No, sir.

Q. Maybe I didn't make myself clear when I asked you if you had anything to do with the payment. I didn't mean did you ever pay it yourself. Did Mr. Swidler ever give you money to give to Regal?

A. There were transactions once or twice when there was a check given to me to give to them.

[173] Q. You say once or twice he gave you checks?

A. I don't recall the exact number of times, but I know on certain instances there were checks given to me to give to the company in payment for the goods received.

Q. Did he ever give you cash to give?

A. No, sir.

Q. Pardon me?

A. No, sir, other than what I had stated.

Q. Now, turning your attention to those few checks which you say that Mr. Swidler gave you, who was the maker of the checks, if you remember? Whose checks were they?

A. Frankly, I don't recall.

Q. Who is the payee, do you remember that?

A. To Regal Equipment.

Q. Did Regal always accept the checks?

A. To the best of my knowledge.

Q. Did they ever return any to Swidler through you?

A. Well, there was one check that there was some question about. I don't recall.

Q. What do you mean there was some question about?

A. Well, there was one check that was refused on some grounds. I don't recall which at the moment.

Q. When you say "refused" you mean Regal wouldn't take it?

[174] A. Regal did not accept it and asked me to return it to Mr. Swidler for another check.

Q. What kind of check did they want?

A. Frankly, I don't recall, but there was some problem at the time, and I don't recall exactly what it was.

Q. Well, what did you do with that check?

A. I returned it to David Swidler.

Q. Did you send it to him?

A. No, I believe I gave it to him when he was in New York.

Q. You gave it to him because you met him on the street, or what? Did you call him to have him come and get it?

A. No, I think it was on one of his visits to New York.

Q. What did he do with the check, if you know?

A. Frankly, I don't.

Q. Did he give you another check?

A. I believe another check was sent to the company.

Q. Not through you?

A. That is correct.

Q. Have you ever had any other transactions with the defendant except at that time?

A. No, sir.

MR. LEES: Cross examine.

* * * * * * * * *

[225] HARRY GREENBURG, having been duly sworn, was examined and testified as follows:

Direct Examination

BY MR. LEES:

* * * * * * * * *

Q. In 1945 did you have any dealings with David Swidler, the defendant in this case?

A. I did.

Q. Did you first meet him in that year?

A. I think I met him the previous year to that.

Q. You think you met him in 1944?

A. Yes.

Q. Under what circumstances?

A. He came up to sell us some maternity dresses.

Q. Did you buy them?

[226] A. Yes.

Q. Do you remember whether he was in business for himself at that time or whether he made sales on behalf of another party?

A. I really don't know if he was in business for himself or not. He represented himself as being in business for himself.

Q. Do you remember the name of the business?

A. Mother Craft.

Q. He said he was David Swidler of Mother Craft; is that right?

A. That is right.

(Photostatic copies of invoices of J. Levenson to Diana Stores Corporation were marked Government's Exhibits 38A to 38F for identification.)

(Checks of Diana Stores Corporation were marked Government's Exhibits 39A to 39F for identification.)

Q. Mr. Greenburg, I show you Government's Exhibit 38A through F and I ask you what they are, if you know.

A. Yes, this is some piece goods he sold us in 1945.

Q. That who sold you?

A. Mr. Swidler.

Q. These are the invoices?

A. Yes.

[227] Q. 38A is an invoice which bears what name?

A. J. Levenson, broker, cotton and rayon piece goods, 105 West 40th Street.

Q. This is the invoice that you received in connection with one purchase?

A. One shipment, yes.

Q. Now I show you Government's Exhibits 39A through F and ask you what they are.

A. Those are checks paid for all these invoices that you showed me just a minute ago.

Q. Whose checks are they?

A. These checks are paid by Diana Stores Corporation.

Q. Of which you were the president then?

A. I was the president, yes, sir.

Q. Are they signed by you?

A. Two are signed by me, two are signed by some other official of the company. The balance of them are signed by some other official of the company.

Q. You say these checks are in payment for these six invoices?

A. Yes, sir.

Q. You have examined them and are satisfied that each check is accompanied by an invoice?

A. Yes, sir.

Q. Who is the payee on all these checks? To whom are they [228] made payable?

A. J. Levenson.

Q. So that the jury may know, will you compare the invoices and the checks and recite the amounts of the checks.

A. The invoice of September 20—

Q. Please refer to them as No. 39A or 38A.

A. 38A was paid by Check No. 39F in the amount of $4157.25.

Invoice dated May 4, $5751.15, was paid by Check 3345, or your reference 39E, for $5751.15.

Q. It will not be necessary to repeat the information about the invoices. I just want the information about the checks, if you will compare them, and then indicate which check it was, the amount of the check, give the number of the exhibit.

A. Check No. 3023 covers invoice of April 26 for $5957.

Invoice G38D for the sum of $5543, was paid by Check G39B in the amount of $5543.

Invoice G38C, for the sum of $5462.50, was paid by Check G39C, $5462.50.

Q. Is that all of them?

A. No, one more transaction. G38B was paid by Check No. G39A, in the sum of $5725.85.

Q. You testified that all these transactions were with Swidler; is that right?

A. Yes, sir.

[229] Q. And each invoice bears the name of J. Levenson as the man who purportedly sent the goods; is that right?

A. These checks were paid to J. Levenson, who supposedly delivered the merchandise to us.

Q. How did you receive the invoices, do you remember?

A. They came in by mail or he brought them in. I don't remember exactly. He may have brought them in himself or mailed them in.

Q. How did you pay the checks? By mail or by delivery?

A. The checks were paid to Mr. Swidler in person.

Q. All of them?

A. All of them.

Q. Where?

A. In our office. He would come up the next day. We would get the goods like today, and he would come up the next day and collect for it.

Q. You testified, I think, that when you first knew him you knew him as David Swidler of Mother Craft.

A. Yes.

Q. And then you had these other transactions, and the invoices all came from J. Levenson; is that right?

A. Yes.

Q. Did Mr. Swidler tell you anything about J. Levenson?

A. I didn't know anything about J. Levenson.

[230] Q. Did you ever ask him about J. Levenson?

A. No, I did not.

Q. Did you ever have any conversation at all about J. Levenson?

A. I did not.

• • • • • • • • • •

[231] Q. Why did you stop purchasing goods from Mr. Swidler?

A. Well, we thought the goods was a little bit overpriced at the time. It was just right after V-J Day, and the piece goods market went a little downward, and on one transaction he gave us a lower price—

Q. One transaction he did what?

A. On the same piece goods, the last transaction, which came up in September, he sold us at a lower price. In other words, you have five invoices here that cover piece goods at $1.15 a yard, [232] and after V-J Day the market went a little bit downward, and I bought—we complained about the price on it.

Q. You say you complained about the price on it?

A. That is correct.

Q. To whom?

A. To Mr. Swidler.

Q. When was that? On the occasion when he picked up a check?

A. That is correct.

Q. He picked up a check and you complained about the price?

A. That is correct.

Q. And what happened then?

A. The next lot of piece goods I bought at 75 cents per yard, and that was the last transaction, I think.

Q. Well, when you told him that the goods were priced too high, what did he say?

A. Well, he told me that was the price of the goods at that time. At this time he was able to give it to us at a lower price.

Q. He said he could sell it to you at a lower price?

A. That is correct.

Q. Did he say anything else?

A. That is all.

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Peggy Diament—Direct

[238] PEGGY DIAMENT, having been duly sworn, was examined and testified as follows:

Direct Examination

* * * * * * * * *

BY. MR. LEES:

* * * * * * * * *

Q. What business are you in, madam?

A. Manufacturing coats and suits.

Q. And in 1945 what business were you in?

A. The same type.

Q. What was the name of your organization?

[239] A. Bader-Diament.

Q. Bader-Diament?

A. It was Bader-Diament. It might have been under Peggy Diament. Bader-Diament, right.

Q. In New York City?

A. That is right.

Q. Did you know Mr. Swidler, the defendant in this case, in 1945?

A. I met him once. That is when I made the purchase. That is when I first met him.

Q. Well, where did you first meet him?

A. In my showroom.

Q. And that is where?

A. I believe it was 512—7th Avenue.

Q. How did you meet him? Did he come in by himself or did sombody bring him in?

A. He was recommended by a woman buyer.

Q. From what store?

A. I believe it was Kaufmann's.

Q. As a result of that recommendation—

A. I met him—pardon me—she was the one that told me that a Mr. Simon, who works for the same organization, was able to have me meet somebody who could—that is, through Mr. Simon I would be able to get some linings.

[240] Q. Did Mr. Simon bring Mr. Swidler to your office or your showroom or did he come himself?

A. In the showroom.

Q. Pardon me?

A. I believe it was in the showroom.

Q. Did Mr. Swidler come alone or did he come with Mr. Simon?

A. Well, if my memory don't fail me, I believe Mr. Simon came with him and introduced me to him.

Q. How did he introduce you to him? What name did he introduce him by?

A. I believe it was Levenson, Mr. Levenson.

MR. KOSSMAN: I beg your pardon?

THE WITNESS: Mr. Levenson.

BY MR. LEES:

Q. You say you believe. Are you saying that you don't know or you aren't sure?

A. No. Well, I remember, you know, meeting him in the showroom, and I believe it was Mr. Levenson, but then later on I found out it was Mr. Swidler.

Q. What did you buy from Mr. Swidler?

A. I made one purchase.

Q. One purchase?

A. Of lining.

Q. Keep your voice up. The jury must hear you, madam.

[241] A. I am sorry. I will try.

MR. LEES: Mark these, please.

(Photostatic copy of Invoice No. 5022 on billhead of J. Levenson, dated 3-21-45, to Bader-Diament, Inc., New York City, was marked Government's Exhibit 40 for identification.)

(Photostatic copy of check of Bader-Diament, Inc., dated March 21, 1945, drawn to the order of J. Levenson, was marked Government's Exhibit 41 for identification.)

BY MR. LEES:

Q. I hand you Government's Exhibit No. 40 and ask you what that is.

A. That is an invoice that I got when I made the purchase.

Q. An invoice you received from whom?

A. From J. Levenson. That is, I got the invoice.

Q. Who handed you or who delivered or how did you get the invoice? Through the mail or did somebody give it to you?

A. No, it was brought up by, to me, I thought then was Mr. Levenson.

Q. Who brought it up?

A. Mr. Swidler.

Q. That is the gentleman sitting next to Mr. Kossman?

A. Right.

Q. You say he handed that to you?

A. He came up the following day after the merchandise was [242] delivered. It was delivered on 27th Street

where the factory was, and he came up the following day after the delivery was made and came up with the invoice.

Q. You say the name is Levenson that is on the invoice?

A. Yes.

Q. And that shows that you purchased what and for how much?

A. I don't know how many yards, but I know what it entailed in dollars and cents. It entailed $18,743. I believe the yardage—would you want me to quote the yardage?

Q. If you remember it or if it appears on the record.

A. Here it is right here, 17,039, probably, and 5 yards at $1.10 a yard.

Q. Government's Exhibit No. 41 is what?

A. That is the check that was issued to him on March 21, in the amount of $18,743.

Q. Signed by whom?

A. Signed by Joseph Bader and Peggy Diament.

Q. He was with you in the business?

A. Right.

Q. You testified that the invoice had the name J. Levenson on it. Will you read the address and the telephone number.

A. 105 West 40th, New York City, Longacre 5-2781.

Q. Now, following the purchase of the lining, will you look at the invoice and the check and tell me if indicates to you [243] when the transaction took place.

A. I am sorry, Mr. Lees. I didn't follow your question then.

BY THE COURT:

Q. What is the date of the check?

A. The date of the check is March 21.

BY MR. LEES:

Q. And did you buy the lining sometime about that time?

A. Yes.

Q. Following the receipt by you of the lining did you have any other further dealings with Mr. Swidler?

A. Any other purchases?

Q. Any other dealings.

A. Oh, yes. I made no more purchases, but I had dealings with him.

Q. Well, tell the jury what they were.

A. Well, after that lining was delivered I found it was inferior.

Q. What do you mean by inferior?

A. It was streaked. I had opened up the cartons before we gave him the check to see what the lining looked like, and opening it up on the table we found that it had a lot of bars and it was streaked, so we stopped payment of the check. We called the bank and stopped payment.

Q. Did you get in touch with Mr. Swidler?

[244] A. No. He came up. There was no way I could get in touch with him. We tried to get Levenson, I think, at that time. We just stopped payment, but he came up.

Q. How did you try to reach Mr. Levenson?

A. By calling this telephone number.

Q. What number is that again?

A. Longacre 5-2781.

Q. What happened when you called the number?

A. There was no Levenson. As a matter of fact, there was no such number, if I remember correctly, but we kept calling, thinking and hoping that we were wrong.

Q. What do you mean when you say there was no such number?

A. I am trying to remember correctly if I can. I believe there was somebody answered the phone. I didn't do the calling. It was my bookkeeper called at the time, and they kept saying—well, one time they said there was no such number and another time they said there is no Levenson.

Q. What happened after that?

A. Well, then Mr. Swidler, who at that time I thought was Mr. Levenson, came in to see me and wanted to know why we stopped payment of the check, and I told him.

Q. What did you tell him?

A. That the goods was not merchantable, it was barred. We couldn't use it because we had to redye it. We couldn't use [245] it in white. It was delivered to us as white goods.

Q. What did he say?

A. I think at that time he even took me over to a friend of his who had a plant, an examining plant, and I think we put it on a roller, and I looked at it, and I said it didn't look right, and he said, "Look, it will be my responsibility." He said, "If you can't use it, I will sell it for you," and under those conditions I took it and I issued him another check.

Q. What happened then?

A. Well, we had some of the goods dyed, and after it was put into the garments, we found that we could not use that type of lining, and I got in touch with Mr.—I couldn't reach him at all, so I got in touch with—

Q. Couldn't reach who?

A. I couldn't reach Mr. Levenson, so I got in touch with Mr. Simon of Kaufmann's, and I told him, "I have been trying to reach this man."

Q. Don't tell us what you told Mr. Simon.

A. Yes.

Q. Were you thereafter able to find Mr. Swidler?

A. No. I went up to the Kaufmann office.

Q. Did Mr. Swidler come to see you thereafter?

A. Yes, he came down to the factory.

[246] Q. What happened at that time?

A. You mean when I told him that I couldn't use it, and he said to me that he would get a customer to buy it, which he did.

Q. He got you a customer. Do you remember the name of the customer?

A. Davison-Paxson, I think.

Q. What are they?

A. They are one of the Macy's stores down South.

Q. Did you ship the goods to them?

A. No. I think it was shipped to a manufacturer. The Davison-Paxon's buyer came up, looked at it, and I sold it to him at the same price that I bought it from Mr. Swidler, and that was all. I think we sent it to a manufacturer that manufactured underwear or petticoats or something, I don't know.

Q. Now, did you yourself try to call that Longacre number?

A. I certainly did.

Q. You yourself tried it?

A. Yes, I did.

Q. How many times?

A. Any number of times, because he was too slow getting rid of the fabric, and I couldn't use it.

* * * * * * * * *

[290] HENRY W. LUDMAN, having been duly sworn, was examined and testified as follows:

Direct Examination

BY MR. LEES:

Q. What is your address, sir?

A. 7 Norman Road, Upper Montclair, New Jersey.

Q. What is your business?

A. Real estate salesman.

Q. For whom?

A. For Durand Taylor Company.

Q. Are you the renting agents for 40 Worth Street, New York?

A. Durand Taylor is the renting agent for 40 Worth Street, New York City.

Q. Were they in 1945?

A. Yes.

Q. In response to our subpoena did you bring those records relating to the premises 40 Worth Street for 1945?

A. I did.

Q. Will you examine those records and tell me whether or not Charles Schwartz was a tenant of yours at that time.

BY THE COURT:

Q. Have you already gone over them?

A. I have, sir. They are one statement for each month, sir.

Q. What did your search of those records disclose? [291] Was or was not Charles Schwartz a tenant in that building?

A. My search of the records showed that Charles Schwartz was not a tenant in 1945.

BY MR. LEES:

Q. First, do your records indicate subleasing by individuals from tenants?

A. They do not.

Q. Would it have been possible for this man, for Charles Schwartz, to have subleased in 1945?

A. It could have been possible, but very doubtful.

Q. What was the practice about subleasing 40 Worth Street in 1945?

A. The practice with regard to subleasing was that a tenant, under the terms of the leases in existence, were not to sublet without consulting and obtaining permission from the landlord.

Q. Would your records indicate if anyone had consulted you and sought to obtain consent for Charles Schwartz?

A. They do not indicate any acceptance of Charles Schwartz as a subtenant.

MR. LEES: Cross examine.

Cross Examination

BY MR. KOSSMAN:

Q. Worth Street is in the textile center in New York?

A. It is.

[292] Q. 40 Worth Street is a very large building?

A. It is.

Q. How many floors has it?

A. Sixteen floors.

Q. Could Schwartz have been an employee working for someone there and you wouldn't know?

A. Yes.

Q. Is White Street close to Worth Street?

A. Three blocks.

MR. KOSSMAN: All right, that is all.

HELEN BREEN, having been duly sworn, was examined and testified as follows:

Direct Examination

BY MR. LEES:

Q. What is your occupation, madam?

A. Lease custodian.

Q. Lease custodian?

A. Yes.

Q. For whom?

A. Albert B. Ashforth, Inc.

Q. What is their business?

A. Real estate.

[293] Q. In New York City?

A. In New York City, yes, sir.

Q. Is Ashforth the real estate agent for the premises 105 West 40th Street?

A. Yes.

Q. Were they in 1945?

A. Yes.

Q. Did you in response to our subpoena bring the records of those premises for that year?

A. Yes, I did, the rent roll for those years, surrounding years, too.

Q. I show you an invoice which has the heading "J. Levenson, broker, cotton and rayon, 105 West 40th Street." Will you look through your records or will you tell us if you already have?

A. I have.

Q. Was there a tenant by the name of J. Levenson at that address in 1945?

A. I have looked through the records, and there was no tenant by that name at that time or any time.

Q. What was your practice in 1945 with respect to subleasing, if you know?

A. Well, we did sublease. We had a practice of subleasing.

Q. Do your records for 1945 contain any indication that any property or any part of the building was subleased to J. Levenson?

[294] A. They do not.

Q. Would it be in there if a sublease had been arranged?

A. Yes, if it had been done according to routine.

Q. What was the routine?

A. If the sublease had been drawn in the office or we had consented to it in writing, it would have been in the record.

BY THE COURT:

Q. How large a building is that, Mrs. Breen?

A. Offhand I don't know exactly, but I would say nine or ten floors.

Q. Is it an office building?

A. It is an office building with a bank at the basement.

Q. What is the custom of persons that have space in there? Is it the custom to put their room numbers on or their floor numbers, or do they just use the address?

A. Well, it is the custom to have—although I don't handle that directly—it is the custom to have the room numbers on and the names on.

Q. Are the rooms all numbered throughout the building?

A. I don't know positively about that building, but as a rule they are.

MR. LEES: Sir, we have a man from Ashforth who can answer that.

THE COURT: All right.

* * * * * * * * *

[295] MOSES D'AMATO, having been duly sworn, was examined and testified as follows:

Direct Examination

BY MR. LEES:

* * * * * * * * *

[296] Q. You are the assistant superintendent and all-around man where?

A. 105 West 40th Street, New York.

Q. What was your job in 1945? In 1945 what was your business?

A. Same.

Q. How long has it been your business?

A. For the last thirty-one years.

Q. Always at 105 West 40th Street?

A. Yes, sir.

Q. I show you this invoice, Government's Exhibit 40, headed "J. Levenson, broker, cotton and rayon, 105 West 40th Street." In 1945 was there a tenant by the name of J. Levenson?

A. No, sir.

Q. Did anybody by that name have an office there or use an office?

A. No, sir.

BY THE COURT:

Q. How big a building is it, Mr. D'Amato?

A. Twelve stories.

Q. Is there elevator service?

A. Yes.

Q. Is there a board with everyone's name?

A. That is right.

[297] Q. Who had charge of putting the names on that board?

A. Well, either myself or the superintendent himself, between the two of us.

Q. Either you or your immediate superior would have charge of that listing board?

A. That is right.

BY MR. LEES:

Q. Do you have access to all of the offices?

A. Yes, sir.

Q. Did you have occasion to visit all of the offices?

A. No, not unless something happens.

Q. What were your duties in the building?

A. Of course, I go around, if they complain about something such as lights may be out of order, or something that isn't just right, naturally, I would go up there and investigate.

Q. You visited the offices, then?

A. Oh, yes.

Q. Did you ever see a J. Levenson?

A. No, sir, not to my knowledge.

Q. Did you ever hear of J. Levenson?

A. No, I wouldn't say I did.

* * * * * * * * *

[304] DAVID GOLDBERG, having been duly sworn, was examined and testified as follows:

Direct Examination

BY MR. LEES:

* * * * * * * * *

Q. Did you know the defendant, David Swidler, at that time?

A. I know him. Yes, I have seen him before.

Q. Did you know him in 1945?

A. I did.

Q. Did you have any business transactions with him?

A. I did.

Q. What kind?

A. I bought some piece goods from him.

[305] Q. Under what circumstances did you meet him?

A. He came to my office. He was recommended by someone.

Q. He came alone or with someone?

A. He came alone.

Q. What name did he introduce himself to you as?

A. I don't recall that there was any introduction.

Q. Did he tell you his name?

A. I don't remember if he told me his name.

Q. Did you buy any goods from him?

A. I did.

Q. How many times?

A. Well, it was several times, but I couldn't remember the amount.

BY THE COURT:

Q. Were you billed for the goods you bought from him?

A. Yes, sir.

Q. Under what name was the billing made?

A. Under two names. I believe one Schwartz and one Levenson.

Q. Did you pay for the goods by checks to the persons shown on the invoices?

A. Yes, sir.

Q. Beatrice Sportswear, was it?

A. I believe it was Beatrice Sportswear or Beatrice Manufacturing Company.

[306] MR. LEES: Mark this, please.

(Photostatic copy of accounts receivable ledger of Beatrice Manufacturing Company, pertaining to Charles Schwartz and J. Levenson, was marked Government's Exhibit 44 for identification.)

BY THE COURT:

Q. Incidentally, how did you pay for them? By cash or check?

A. By check, sir.

Q. Did you mail the check or present it to somebody? How did you pay?

A. Mr. Swidler always came up for the check. I presented it to him.

Q. You handed him the check personally?

A. Yes, sir.

(Photostatic copies of checks from Beatrice Manufacturing Company were marked Government's Exhibits 45A to G inclusive for identification.)

(Photostatic copy of invoice of Charles Schwartz, dated April 19, 1945, to Beatrice Manufacturing Company, was marked Government's Exhibit 46 for identification.)

BY MR. LEES:

Q. You said you made purchases from this man and he gave you invoices; is that right?

A. That is right.

[307] Q. Have you testified what the names on the invoices were?

A. I mentioned it. There were two names.

Q. And those names were what?

A. One was Schwartz and one was Levenson.

* * * * * * * * *

[381] EDWARD L. BRAUNE, having been duly sworn, was examined and testified as follows:

Direct Examination

BY MR. LEES:

* * * * * * * * *

Q. You brought certain records here at my request?

A. Yes, I have.

Q. Records of what?

A. I have brought the telephone directories issued by the New York Telephone Company for the year 1945, two issues.

E. L. Braune—Cross

Q. Do your records show a telephone number at 105 West 40th Street for J. Levenson? The number would be Longacre 5-2781. [382] Longacre is the exchange. Under the name of Levenson.

A. Will you spell Levenson.

Q. L-e-v-e-n-s-o-n.

THE COURT: J is the initial.

A. In the winter-spring issue for 1945, in the Manhattan alphabetical telephone directory, Page 622, there is no listing in that name at that address or that telephone number.

MR. LEES: Cross examine.

Cross Examination

BY MR. KOSSMAN:

Q. Are you familiar with the general practice in New York, which would be the same in the country?

A. It is pretty much the same all over.

Q. If there is a phone in my name, can someone else use that phone without notifying the Bell Telephone Company, and put it on billheads?

A. That is a practice that is commonly used, yes.

Q. Am I correct in saying that this phone number, Longacre 5-2781, that Longacre was the correct exchange for 105 West 40th Street? If you can't answer that without looking at something, I have got this Bell Telephone paper, so if someone in New York finds a page missing, you will know where it is.

105 West 40th Street, textile company, what is the exchange?

[383] A. 5.

Q. Same as this, correct?

A. That is correct.

Q. Elkins, M., 105 West 40th Street, what is the exchange?

A. Is it 5?

Q. So, therefore, that was the proper exchange for that building and that address; is that correct?

A. I would say that is correct.

MR. KOSSMAN: So would everybody else. Thank you very much. That is all.

BY MR. LEES:

Q. Would all the telephones in the building have the same exchange?

A. Not necessarily, no. New York City is quite large. There is also a Longacre 3 exchange that was active in 1945, but in that general area Longacre would be the exchange. That would cover it, yes, that is correct.

BY THE COURT:

Q. Have you any records that would tell us here today who had Longacre 5-2781 in 1948?

A. No, Your Honor. We made a very careful search, even though I know that the retention period for canceled records is only two years. I wasn't able to find anything, except to bring these two directories that were in existence.

[384] Q. They are the only records that you have now going back that far?

A. Yes, Your Honor, that is correct.

Q. You say your period of retention of canceled listings is only two years?

A. It was two years after cancellation, and that has since been amended, with the permission of the Federal Communications Commission, for one year retention after cancellation or disconnection.

Q. So looking back now you must of necessity refer to your directory distributed to the public?

A. Yes, Your Honor, that is what I did.

Q. There is no listing there?

A. I didn't find any, and I have got the page before me.

Q. Do you have anything for Worth Street there? There is a Worth Street in Manhattan, is there?

A. Oh, yes, it is.

Q. See if you can find a Charles Schwartz listed at 40 Worth Street, as long as we have you here.

MR. KOSSMAN: There was no phone shown, Your Honor.

THE COURT: I know. Maybe we can find out something.

"Schwartz" is spelled in a variety of ways, so [385] show him one of the billheads, will you, Mr. Schuman.

(Exhibit G49 handed to the witness.)

THE WITNESS: In the winter-spring issue I don't find a Charles Schwartz at 40 Worth Street. I will look at the other issue if you wish me to.

THE COURT: Oh, yes, sure. The winter-spring, that would take in the early part of 1945?

THE WITNESS: Yes, Your Honor. Then I have the other issue, which is the summer-fall of 1945.

Stipulation of Counsel

I have examined all the Schwartzes in the summer-fall months, and I don't find any listed at 40 Worth Street, Your Honor.

* * * * * * *

[419] MR. LEES: There are three check cashing agencies involved, sir—the Mintz Check Cashing Agency, the Municipal Check Cashing Company, and one other one, Herbert Greenhouse, and they are all identified, Your Honor may remember, by certain digits, certain letters followed by digits on the back, on the second endorsement. One reason that this man is here from the Hellenic Bank Trust Company is to testify that the endorsement "Pay Hellenic Bank Trust Company or order" with the letter and digit C-100 following it, indicates that it was placed there by the Mintz Check Cashing people.

MR. KOSSMAN: I will agree that all endorsements on checks that have C-100 were placed by the Mintz Check Cashing Service.

I mean, is that so?

MR. LEES: Yes.

MR. KOSSMAN: All right, I will stipulate to that.

THE COURT: How about the Herbert Greenhouse and the other one? What are those numbers?

MR. LEES: The MCCC, Municipal Check Cashing Company, was testified to by Mr. Shipley at the last trial. You allowed him to testify that was a public check cashing agency.

Colloquy

MR. KOSSMAN: I will agree that MCCC is a public [420] check cashing agency. I mean that is the limit of the stipulation. I know nothing else.

THE COURT: Wait a minute. That where an endorsement appears of MCCC, that was deposited in the bank by that check cashing agency?

MR. KOSSMAN: Yes.

THE COURT: So that any inference the jury wants to draw that the check was given to Schwartz or Levenson, it was endorsed, and then this is the second endorsement, a check cashing agency?

MR. KOSSMAN: I can't say who endorsed it.

THE COURT: I don't know who endorsed it, but I say a second endorsement appears through this agency. That is what I am talking about. That is as far as your stipulation goes.

MR. KOSSMAN: Are those checks in evidence?

THE COURT: It either goes that far or there will be testimony about it.

MR. KOSSMAN: Well, let us take a look at the check. If I look at it and it says MCCC, all right. This is testimony that wasn't present last time.

THE COURT: Yes, it was.

MR. KOSSMAN: By a bank man?

MR. LEES: Mr. Shipley testified. There is the C-100.

[421] MR. KOSSMAN: I agree that C-100 means the bank check.

Colloquy

THE COURT: Yes, but that wasn't what the court was talking about.

MR. KOSSMAN: Where is MCCC here?

MR. LEES: This is C-100 (indicating).

MR. KOSSMAN: C-100 I agree.

THE COURT: Anywhere that C-100 appears it is agreed that it was cashed at the Mintz Check Cashing Agency.

MR. LEES: All right.

THE COURT: Now let us take the second one and then let us take the third one. Let us see how far we get with those others. That will not, however, eliminate, as I understand it, Mrs. Mintz as a witness.

MR. LEES: No, sir, not at all.

THE COURT: Now we will see, maybe we can eliminate Greenhouse. Maybe we can eliminate somebody else by stipulation.

MR. LEES: Here is one that says "Pay to the order of Hellenic Bank Trust Company." The only trouble is you can't see the C. It says 39 on it, Mr. Shipley.

Are you familiar with that, sir?

MR. REYNOLDS: 39 is right. I don't remember [422] C-39.

MR. LEES: The 39 indicates Herbert Greenhouse?

MR. REYNOLDS: Greenhouse-Herbert, Limited.

THE COURT: Greenhouse-Herbert, Limited, which is a check cashing agency?

MR. REYNOLDS: Yes.

THE COURT: That represents his endorsement?

MR. REYNOLDS: Yes, sir.

THE COURT: Greenhouse-Herbert, Limited?

MR. REYNOLDS: Yes, sir.

MR. KOSSMAN: I will agree it doesn't say C.

MR. LEES: The C was wrong. It is just 39.

MR. KOSSMAN: All right. Is that all?

MR. LEES: Then we have MCCC.

THE COURT: Does that go for any check that bears that endorsement?

MR. KOSSMAN: That is right.

THE COURT: Any check?

MR. KOSSMAN: Any check.

THE COURT: That is admitted in evidence.

MR. KOSSMAN: Yes. Actually anything with that initial was cashed there. Actually speaking, I mean the way the Government's case is based, an income tax case, they have [423] got certain specific checks which were cashed in a certain check cashing agency, but who got the money is another problem, who got the income.

THE COURT: We meet that at the end of the case.

MR. KOSSMAN: What is the other endorsement? We got rid of 39 and we got rid of C-100.

MR. LEES: The other endorsement, sir, does not relate to any testimony that this gentleman could give you. He may go, as far as we are concerned. We had nobody from MCCC, the Municipal Check Cashing Company.

THE COURT: All right, but you do have some checks. Show them to Mr. Kossman.

MR. KOSSMAN: I will stipulate to some even if you have no witness. I reserve, of course, the right to argue whether all of this is relevant.

* * * * * * * * *

[478] DANIEL K. SHIPLEY, having been duly sworn, was examined and testified as follows:

Direct Examination

BY MR. LEES:

Q. Now, in connection with this investigation did you talk to the defendant?

A. I did.

Q. Did you go to his place of business?

A. Oh, yes.

Q. How many times did you talk to him?

A. Well, on two occasions that I recall.

Q. When was the first time, if you remember?

A. About April 2, 1948.

Q. Where did you speak to him then? Do you remember that?

A. At his place of business, in the office, 139 North 12th Street, I believe is the address.

Q. That is the office of Mothercraft?

A. Yes, sir.

Q. Did you at that time ask him about Schwartz and Levenson?

A. Yes, sir.

Q. Did you ask him if he knew them?

A. I did. He said that Levenson came into his place of business two or three times a week and he bought piece goods from [479] Levenson.

Q. By the way, did he give you his name with respect to the J? Did he tell you what his first name was?

A. No, sir. As I recall, the company had invoices that they paid, which showed the printed name J. as an initial, and Levenson, and it was from that invoice that the questioning began with the taxpayer, so I had no occasion to ask him what the man's first name was. I was going by that invoice.

Q. He told you that Levenson came there; is that right?

A. Yes, sir.

Q. What else did he say about him?

A. Well, I asked him if he had ever sold any merchandise to Einhorn Brothers and he said no. He said he may have sent Levenson there.

Q. Well, did you ask him about Mr. Schwartz?

A. At that time he said he didn't know Mr. Schwartz.

Q. He said he knew Levenson but didn't know Schwartz?

A. Yes, sir.

Q. Did you ask him how you can get hold of Levenson?

A. I asked him if he ever contacted him in New York, and he said no, he came into the office about three times a week and he was able to contact him by reason of those frequent visits.

Q. Did you ask him if he had ever had occasion to call that [480] Longacre phone number or 145 West 40th Street?

A. I never discussed that with him. I asked him how he contacted Mr. Levenson, and he said that Mr. Levenson came into his office, into the Mothercraft premises, about two or three times a week.

Q. By the way, did he give you access to his books and records?

A. Oh, yes.

Q. You looked at his books?

A. Yes, sir.

Q. Do you remember whether you ever saw any references to any of these transactions in the books? When I say "these transactions" I mean the ones you just told the jury about.

A. There was no record reflected on his books of the sales to Bader-Diamond—these that I have just listed—Kaufman's.

Q. Now, you said that he never had sold any goods to Einhorn but he sent somebody there?

A. He said he may have sent Mr. Levenson there.

Q. To do what?

A. Well, I asked him did he ever sell any merchandise to Einhorn Brothers, and his reply to me was that he himself never did but that he may have sent one of the Levensons there.

Q. That was the first time you say you talked to him?

A. Yes, sir.

[481] Q. Did you talk to him on another occasion?

A. I did.

Q. When was that?

A. On January 12, 1949.

Q. Where was that?

A. That was in the office of the Intelligence Division, Internal Revenue Service, in the Ayer Building.

Q. You talked to him once in April, 1948, and then ten months later on?

A. Yes, sir.

Q. Why did you talk to him the second time?

A. Well, it is a procedure established by the Bureau.

Q. What is the procedure? Tell the jury that.

A. When you have completed a field examination, you send a letter out to the taxpayer giving him an opportunity to make explanation of any of the items that you can't reconcile with his return, and in pursuance of that procedure Mr. Swidler was invited into the office to make any explanation he chose to make regarding his income tax liability, and at that time a stenographer was present and his answers were recorded.

Q. On that occasion did you ask him about J. Levenson?

A. Yes, I did.

Q. I take it you asked him a lot of questions at that time?

A. Yes, sir. Well, one of the main questions that I asked [482] him was, did he ever cash any checks at a check cashing agency in New York, and he said no, and I asked him did he ever accompany anyone to those check

cashing agencies when they were cashing checks, and he said no.

Q. Did you ask him about the Mintz Factors, check cashing agency?

A. I did.

Q. What did he say about that?

A. He declined to answer, and I asked him about the Kaufman transaction, if he could explain the fact that Mr. Kaufman had told me that he had something to do—

Q. Don't say—

A. I am telling you what I told the taxpayer.

Q. Go ahead. That is proper.

A. —that Mr. Kaufman had made a statement to me alleging that the taxpayer had participated in a sale to Kaufman's Department Store. I explained that Mr. Kaufman had told me that he had reimbursed Mr. Kaufman for some of the merchandise returned, and could he give me an explanation of that. I said further that the records of Kaufman's Stores indicated that the merchandise was returned to the Morton Rose warehouse, and in my examination I had had previous discussion with Mr. Swidler about the Morton Rose warehouse. He told me that he was a [483] partner with Morton Rose, so I asked him about that merchandise that was returned. He said that Levenson had some merchandise there once for them to look at but they weren't interested in that type of merchandise and he don't know what Levenson did with it.

Q. You are talking about the merchandise from Kaufman's? Is this the merchandise—

A. That was returned from Kaufman's to Morton Rose warehouse, yes, sir.

Q. I take it at this stage of the game when you talked to him you had learned a great deal about the taxpayer; is that right?

A. Oh, yes.

Q. Did you ask him about Samuel Cohen?

A. Yes, I did. I asked him if he ever had any business transactions with Samuel Cohen, because there was a loan appeared on the Mothercraft books of $7500 to Cohen, and he said that he had loaned him some money and that it had been repaid within about three weeks, and as I inquired the occasion of the loan and the detail of the loan, he told me that was none of my business, all I should be concerned about was the loan was paid off in the books, what it was for or why it was done was none of my business.

Q. But he did admit knowing Cohen?

[484] A. Yes, sir, and he denied having any other transactions with Mr. Cohen other than this loan, this $7500 loan.

Q. Did you ask him about all this merchandise that Mr. Cohen has told us about that came to Bridgeport Luggage?

A. No, sir, I didn't ask him a direct question on that. I gave him enough lead in that Cohen—If he wanted to tell me, he could.

Q. Did you ask him anything about this transaction with Mrs. Mann, the lady from California?

A. I did not.

Q. Did you ask him if he knew Peggy Diamond, Bader-Diamond?

A. I did.

Q. What did he say about that?

A. He didn't recall.

Q. He didn't recall what?

A. I asked him if he knew Peggy Diamond, and he said he didn't recall. I said "Peggy Diamond of the Bader-Diamond Company in New York." He didn't recall.

Q. Well, did you ask him if he had sold any goods to Bader-Diamond?

A. No, sir, I did not. I did not.

Q. Did you ask him if he ever used the name Levenson or Schwartz?

[485] A. I did. He said no, but that he may have been mistaken for one of them because he had been with Levenson.

Q. He had been with Levenson where? Where and when?

A. He didn't say where or when. He just said it was possible that he was mistaken for Levenson, as he had been in Levenson's company. That was his answer to me. I don't know why.

Q. What did he say about Levenson on this occasion? Did he say anything else about Levenson?

A. That is the best of my recollection that I have answered, sir.

Q. How about Schwartz? Did he say anything about Schwartz?

A. Not that I recall on this occasion.

Q. What did he say about Beatrice Manufacturing Company, Dave Goldberg's place?

A. I asked him if he ever purchased any goods from Beatrice Manufacturing Company.

Q. What did he say?

A. He said that he never did, but that he had sent Mr. Levenson there and he may have gotten some goods.

Q. Well, did he say that Mr. Levenson worked for him?

A. No, sir.

Q. Did he say he had any transactions with Levenson whereby either one of them gained?

[486] A. Oh, he bought merchandise, he told me, and there were invoices there indicating billings to Mothercraft from both Schwartz and Levenson.

Q. Did he say he bought goods from Schwartz?

A. Yes, sir, but I believe that he said when he bought the goods from Schwartz that he bought it through Levenson, Levenson was the fellow that came there.

Q. Did he ever say Schwartz came there?

A. I don't definitely recall, but my recollection is that he only dealt with Levenson. He got billings from Schwartz, but Levenson was the man that he dealt with.

Q. Did he say he knew Schwartz?

A. No, I don't believe he did. I might say that in connection with that Kaufmann sale, one invoice of which was Schwartz and one was Levenson, that I asked him, I was talking to him at great length, to get the detail of his connection with that transaction, and he declined to answer questions.

Q. What did he say? Did he say anything about Bill Stein?

A. I don't believe I mentioned the name Bill Stein to him.

Q. How about Regal?

A. It wasn't my purpose to disclose the Government's case, Mr. Lees, just to give enough indications of transactions for him to make explanations if he wished to make any.

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[490] *Cross Examination*

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[537] BY MR. KOSSMAN:

Q. Now, you interviewed Mr. Cohen, didn't you?

A. Yes, sir.

Q. Am I right?

A. You mean Samuel Cohen of Bridgeport Luggage?

Q. When was the first time you interviewed Mr. Cohen?

[538] A. I couldn't answer that without quite some thought, counselor.

Q. Well, when you came to see Mr. Cohen you knew the goods had been shipped from the Bridgeport Luggage; is that correct?

A. Yes, sir.

Q. Is that right?

A. When I first came to see Mr. Cohen?

Q. Yes.

A. Yes, sir. You mean at the Bridgeport Luggage?

THE COURT: Read the question so I can understand and follow. Read them both. I would like to follow the continuity of it, the previous question, the answer, and then the succeeding part.

(The last three questions and answers were read by the reporter.)

THE COURT: Start all over. That doesn't make any sense.

BY MR. KOSSMAN:

Q. You went to see Mr. Cohen; is that correct?

A. At the Bridgeport Luggage Company.

Q. Yes.

A. Yes, sir.

Q. Mr. Cohen told you he made no profits out of these [539] transactions; is that correct?

A. That is correct.

Q. And he told you that the Bridgeport Luggage Company made no profit out of any of these transactions that we have discussed; is that correct?

A. That is correct.

Q. You went to see Mr. Bassen and Mr. Brodsky in New York?

A. Yes, sir.

Q. And they told you they made no profits; is that correct?

A. Profit out of what?

Q. Out of these transactions.

A. They were not asked a question like that and they didn't answer a question like that. They told me that they permitted the storage of merchandise, otherwise, a drop in New York of merchandise from the Pacific Mills, to be stored in their place. Mr. Brodsky said that it became a nuisance, and then he called on his nephew to intercede with him to have the merchandise dropped at his premises, and that happened, and he no longer had the

nuisance value of the merchandise coming into his place of business.

Q. Did you investigate Mr. Cohen's personal bank account?

A. I personally?

Q. Yes.

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